IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Cause No. DA 10-0095

IN THE MATTER OF THE)
ESTATE OF)
)
SUE FORD BOVEY,)
)
Deceased.)

BRIEF OF APPELLANTS

On Appeal From The Montana Eighth Judicial District Court, Cascade County

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I. STATEMENT OF APPEAL ISSUES PRESENTED FOR REVIEW

1. Whether the District Court erred in granting summary judgment to Respondents, Thomas Couch, Patsy Allen, Connie Sisko, Judy Bistodeau (the "Couch Respondents"), Robert Ford Faegre, Shirley Page Faegre and Mary W.F. Putnam (the "Faegre Respondents"), concluding that laches and estoppel applied to the claims of Petitioners, Christine Carrier and Melissa Reavis ("Christine" and "Melissa") and that notice precluded the claim of Petitioner, Toni Couch ("Toni").

2. Whether the District Court erred in denying Petitioners' *Amended Petition for Order for Redistribution of Property Improperly Distributed*.

II. STATEMENT OF THE CASE

Sue Bovey was an only child, the same as her son, Ford Bovey. Sue Bovey died October 7, 1988. Prior to her death, Sue Bovey executed a *Will* in 1984 which created a trust to pay benefits to her son, Ford Bovey. The *Will* states:

> [U]pon the death of my son, Ford, this trust shall terminate and all of the then remaining accrued and unpaid income and all of the then remaining principal of the trust shall be distributed, outright, and free of trust, in equal shares, to my then living heirs-at-law.

Between the time of Sue Bovey's death in 1988 and Ford Bovey's death on December 10, 1999, Ford adopted a 25 year old woman (Lisa Bovey) in 1993.

Thus, upon the death of Ford Bovey, an issue arose as to whether Sue Bovey's "then living heirs-at-law" was limited to Lisa Bovey. If not, Sue Bovey's "then living heirs-at-law" were Christine, Melissa, Toni, the Faegre Respondents and the Couch Respondents. These facts are not in dispute.

The trust was managed by Norwest Trust, N.A. ("Norwest"), for the vast majority of the time between Sue Bovey's death and the death of Ford Bovey out of the Great Falls Norwest trust office. However, in the last ten months of Ford Bovey's life, the trust was managed out of the Missoula Norwest trust office.

Within two months of Ford's death, the Couch Respondents filed a petition to reopen the Estate of Sue Bovey in Cascade County. Shortly thereafter, the Trustee, Norwest Bank, filed a proceeding under Mont. Code Ann. §72-35-301(2)(d) to ascertain "beneficiaries and determining to whom property shall pass or be delivered upon final or partial termination of the trust, to the extent the determination is not made by the trust instrument . . ."

Thus, the litigation took two jurisdictional paths. One started in Cascade County wherein the Couch Respondents (later joined by the Faegre Respondents) requested the probate of Sue Bovey be reopened. The other took place in Missoula County wherein Norwest and Lisa Bovey argued that a trust proceeding should proceed under the Montana Trust Code.

During the entire litigation, Christine, Melissa and Toni were never given notice of either of the proceedings. It was Respondents' position and the District Court found, that constructive or substitute notice by publication to Christine, Melissa and Toni was proper under the circumstances when the Trustee published notice in the *Missoulian*.

The publication was allegedly done in accordance with Mont.R.Civ.P. 4D. It is Christine's, Melissa's and Toni's position that the strict and literal compliance required by Mont.R.Civ.P. 4D(5), was not followed in several crucial respects and therefore any judgment rendered based upon that publication is void.

Moreover, it is Christine's, Melissa's and Toni's position that, even if publication was proper, there never was a default taken against them and never any judgment entered against them in either the Missoula or Cascade County proceedings. Both District Court records are devoid of the required pleadings of default and judgment.

Eventually, the two proceedings were consolidated in Cascade County as a reopening of the Estate of Sue Bovey, Cascade County Cause No. CDP-88-215, and a trial proceeded with only seven of the ten heirs (being all of the Respondents) and Lisa Bovey as litigants. After judgment in the underlying case (without notice to Christine, Melissa and Toni), the District Court found that Lisa Bovey was not a "then living heir-at-law" of Sue Bovey. The matter was appealed to this Court. This Court issued its decision on March 2, 2006 affirming the District Court and remanded the matter for distribution of the Trust. *In Re Estate of Sue Ford Bovey*, 2006 MT 46, 331 Mont. 254, 132 P.3d 510 (2006). The trust estate began to be distributed in June 2006 and has continued to do so beyond the date of the *Petition* filed by Christine, Melissa and Toni.

On April 13, 2007, Christine, Melissa and Toni filed their *Amended Petition for Order for Redistribution of Property Improperly Distributed*. The District Court issued its *Order re: Motions for Summary Judgment* on February 2, 2010 stating that the notice by publication, laches and estoppel, precluded Christine, Melissa and Toni from their rightful 3/10 distribution of the trust estate. App. Ex. 1. *Judgment* was entered and *Notice of Appeal* was filed on February 26, 2010.

III. STATEMENT OF FACTS

Sue Bovey was an only child, the same as her son, Ford Bovey. *Findings*

of Fact, Conclusions of Law and Order ("*FFCL&O*"), p.4. Cascade County Docket ("Casco Doc.") No. 353. Sue Bovey died October 7, 1988.

Prior to her death, Sue Bovey executed a *Will* in 1984 which created a trust to pay benefits to her son, Ford Bovey. *Order of Formal Probate of Will and Appointment of Personal Representative*, p. 1. Casco Doc. No. 3. The *Will* states:

> [U]pon the death of my son, Ford, this trust shall terminate and all of the then remaining accrued and unpaid income and all of the then remaining principal of the trust shall be distributed, outright, and free of trust, in equal shares, to my then living heirs-at-law.

Id. at Exhibit A, p. 1.

Between the time of Sue Ford Bovey's death in 1988 and Ford Bovey's death on December 10, 1999, Ford adopted a twenty five year old woman (Lisa Bovey) in 1993. *FFCL&O*, p. 4. Casco Doc. 353.

At the time of Sue Bovey's death in 1988, her attorneys, Cordell Johnson and Newell Gough, recognized the difficult task ahead of them to determine who Sue's potential "heirs-at-law" might be some day in the future. Deposition ("Depo") of Cordell Johnson, p. 8, l. 8-17. Cordell Johnson developed a family tree for Sue Bovey. *Id*. at p.8, l. 11 - p. 9, l. 19.

The same family tree, with Sue Bovey's name highlighted in green and indications as to Sue's other relatives who were alive (highlighted in yellow) and dead (black X's) at the time of Ford Bovey's death in 1999 is reproduced as page 7. Depo. Exhibit (hereinafter "Ex.") 2, p. 2 (the parties orally stipulated to utilizing the same Exhibits for all Depositions). Under Mont. Code Ann. §72-2-113 (1)(d)(I), the "then living heirs-at-law" included Christine Carrier, Melissa Reavis and Toni Couch (hereafter "Christine, Melissa and Toni")

because their father, Terry Couch had predeceased Ford. These facts are not in dispute.

This was all recognized by Cordell Johnson and Newell Gough, because they looked for all of the potential future heirs at the time of Sue Bovey's death. Depo. of Cordell Johnson, p.17, l. 22-25. In fact, Newell Gough wrote letters to the Couch Respondents and Joyce Couch (Joyce is Christine's, Melissa's and Toni's mother). *Id*. at p. 18, l. 1-7. Depo. Ex. 1.

In response to that letter, all of the Couch side of the family, including Joyce Couch (on behalf of her daughters), responded to Newell Gough, giving him information about their families. Depo. Ex. 3, 4 and 35.

Because Patsy Allen, Connie Sisko, and Judy Bistodeau all knew about the potential for becoming an heir, they watched the paper. Within weeks of Ford's death, their attorney, John Paul, contacted Wells Fargo Bank (formerly Norwest Bank and hereafter referred to as "Norwest"), the trust company managing the testamentary trust of Sue Bovey, and demanded their share of the trust. Depo. Ex. 12. The December 29, 1999 letter was written to Norwest's attorney, Dirk Williams. *Id*. Included with that letter was the family tree developed by Cordell Johnson. *Id*. The Couch Respondents did not include their nieces, Christine, Melissa and Toni, in those discussions.

At the point in time Ford Bovey died, the Trust had been managed out of the Missoula Norwest office for approximately 10 months, despite having been managed out of the Great Falls office for many years. Depo. Ex. 12. About that same time, Dirk Williams had also heard from the attorney for Lisa Bovey (Mars Scott), who claimed, because Ford Bovey had adopted her, that she was the sole "then living heir-at-law" of Sue Bovey. As a result, Norwest hired Dirk Williams, to file a petition with the Missoula District Court to determine the

heirs. *Verified Petition for Order Ascertaining Beneficiaries and Determining to Whom Trust Property Shall Pass or be Delivered Upon Final or Partial Termination of Trust.* Missoula Doc. No. 1. At approximately the same time, Tom Couch hired Art Matteucci to represent him. *Petition for Reopening the Estate of Sue Ford Bovey*. Casco Doc. 19. Mary Putnam, Shirley Faegre and Robert Faegre joined the fray a couple of months later, hiring George McCabe as their attorney. See Casco Doc. No. 46.

The Couch and Faegre Respondents objected to the matter being litigated in Missoula County, and had already filed their own petitions in Cascade County to reopen the Estate of Sue Bovey. See, e.g., *Petition for Reopening the Estate of Sue Ford Bovey*. Casco Doc. 19. Thus, for over a year, the issues between Norwest, Lisa Bovey, the Couch Respondents and the Faegre Respondents, were litigated in two forums, with Norwest and Lisa Bovey advocating for the Trust proceeding in Missoula County and the Couch/Faegre Respondents advocating for re-opening the Estate of Sue Ford Bovey in Cascade County.

It is within the context of the Trust proceeding in Missoula County where the events crucial to this appeal took place. On March 6, 2000, Norwest filed its *Verified Petition for Order Ascertaining Beneficiaries and Determining to Whom Trust Property Shall Pass or be Delivered Upon Final or Partial Termination of Trust.* Missoula Doc. No. 1. App. Ex. 2. In the *Verified Petition*, Norwest noted demand had been made of it by Lisa Bovey on the one hand, and the Couch Respondents on the other hand, each demanding distribution of the trust proceeds to them. *Id.* at p. 3.

Three days later, on March 9, 2000, Norwest drafted and had the Missoula Clerk of Court issue a *Summons* to "All Persons, Known or Unknown, Who Claim or May Claim an Interest in the Sue Ford Bovey Testamentary Trust

Under Will Dated September 13, 1984." Missoula Doc. No. 3, App. Ex. 3. On March 8, 2000, only two days after filing its *Verified Petition*, Norwest filed a *Request for Hearing*, asking the Missoula District Court to rule on its *Verified Petition* at the regularly scheduled Law and Motion day of May 16, 2000. Missoula Doc. No. 4. App. Ex. 4. At that early stage, the publication had not even taken place. Publication of the Summons was made on April 11, 18 and 25 in the *Missoulian*. Missoula Doc. No. 31. App. Ex. 5.

The Summons by Publication does not mention the names of Christine, Melissa, Toni, Robert Faegre, Mary Putnam or Shirley Faegre, despite Dirk Williams knowing of their potential to be beneficiaries and his having looked for them. During his deposition, Dirk Williams, testified:

Q. Who did you intend to serve?

A. Wells Fargo, through counsel, intended to serve all persons who claim or might claim an interest in the Estate. And we did not know – I did not know who that might be or where we would find them.

Q. Did you make any effort to find Robert Faegre, Shirley Faegre and Mary Putnam?

A. I did.

Depo. of Dirk Williams, p. 56, l. 21 - p. 57, l. 4.

Q. What efforts did you make to find Christine Carrier Couch, Melissa Reavis Couch and Toni Couch?

A. Using the family tree I was given, I attempted to contact Terry Couch and Joyce Couch, and again using the same methods I used with respect to – the Faegres, the Great Falls area phone book, the Missoula phone book, and I believe requested that my paralegal who was in Great Falls, check with the Cascade County Clerk and Recorder for an address.

Depo. of Dirk Williams, p. 58, l. 7-17.

The Summons by Publication did not bring any response. Based upon those efforts, Norwest, despite obviously knowing of the potential claims of Christine, Melissa and Toni, filed a *Praecipe for Entry of Default* (Missoula Doc. No. 63. App. Ex. 6) and an *Affidavit of Dirk Williams* (Missoula Doc. No. 64. App. Ex. 7). The *Affidavit of Dirk Williams* stated "the only persons who have appeared in this matter, and whose default is not sought, are the following: . . ." (then listing Lisa Bovey and the Couch/Faegre Respondents). *Id*. at p. 2. Nowhere in the *Affidavit* did Dirk Williams state that he had looked for Christine, Melissa and Toni, but was unsuccessful.

The *Praecipe for Entry of Default* and the *Affidavit of Dirk Williams* are each dated August 22, 2000, the same day of a hearing in the Missoula District Court. The *Minutes and Note of Ruling* from that hearing reflect the following:

> Petitioner's Praecipe for Entry of Default and supporting Affidavit were filed with the Court, requesting that default be entered on all parties except those represented by counsel this date. Said procedure was not opposed, and allowed by the Court.

Minutes and Note of Ruling. Missoula Doc. No. 62. App. Ex. 8.

Dirk Williams never told the Court that he had looked for Christine, Melissa and Toni, but could not find them. Depo. of Dirk Williams (2nd Deposition), p. 42, l. 5-11. After a protracted discussion about what information Norwest conveyed to the District Court about other potential beneficiaries, particularly Christine, Melissa and Toni (*Id*. p. 42-52), Dirk Williams finally admitted he did not tell the District Court about other potential beneficiaries before attempting to take their default:

Q. . . . did you tell the Court anything to assist it in a determination like that? If you – if it's only your affidavit and the default, that's fine, that's all I want to know is if you told them anything else.
A. Not that I recall.

Depo. of Dirk Williams (2nd Deposition), p. 50, l. 12-16.

Nowhere in the remaining pleadings is there a default of Christine, Melissa and Toni. Nowhere in the remaining pleadings is there a default judgment against Christine, Melissa and Toni.

It is based upon the foregoing publication pleadings, that Respondents now contend Christine, Melissa and Toni had adequate notice of the proceedings herein, and laches and estoppel apply. The facts and law do not support their contention.

After the August 22, 2000 hearing in Missoula District Court, the other parties filed numerous motions and other pleadings, fighting out where the case would take place and what type of action it would be. Ultimately, the Respondents prevailed, and the matter proceeded in Cascade County by reopening the Sue Bovey Estate. The Court order consolidating the Missoula and Cascade County cases into one case in Cascade County was entered March 30, 2001. *FFCL&O*, p.3. Casco Doc. No. 353.

The litigation between Lisa Bovey and the Couch/Faegre Respondents went to trial in February 2004. *FFCL&O*, p.1. Casco Doc. No. 353. During the entire time, absolutely no one ever informed Christine, Melissa and Toni, that they should have been participants in the litigation. No notice to heirs or a publication of summons was done in the re-opened Estate of Sue Bovey, Cascade County Cause No. CDP-88-215.

Ultimately, the District Court decided that Lisa Bovey was adopted by

Ford Bovey to thwart his mother's wishes, and that the true heirs-at-law in accordance with the intestate succession statute were Tom Couch, Patsy Allen, Connie Sisko, Judy Bistodeau, Mary Putnam, Shirley Faegre and Robert Faegre. *FFCL&O*. Casco Doc. No. 353. The Court never mentioned Christine, Melissa and Toni because the court had no knowledge of them.

After this Court affirmed the District Court's decision (rehearing was denied April 5, 2006), the District Court ordered distribution of the assets on June 7, 2006. *Order Authorizing and Directing Distribution of the Trust Assets*. Casco Doc. No. 392. Beginning in early July 2006, and continuing until at least July 17, 2007 (over two months after the instant Petition was filed), the seven Couch/Faegre Respondents received multiple distributions from the trust. See App. Ex. 9 setting forth the distribution of over $4,000,000.00 to the Couch/Faegre Respondents, despite notice of Christine's, Melissa's and Toni's objections. From these facts, Christine, Melissa and Toni filed their *Petition for Order for Redistribution of Property Improperly Distributed*.

IV. STANDARD OF REVIEW

The standard of review employed by this Court in summary judgment matters is *de novo*. *Rich v. Ellingson*, 2007 MT 346, ¶12, 340 Mont. 285, 174 P.3d 491.

V. SUMMARY OF ARGUMENT

The alleged service by publication is not available in a trust proceeding. Even if the District Court ignored that provision and considered this a probate proceeding, notice by publication was improper under Rule 4D M.R.Civ.P. in at least five ways. Because the publication was improper, any judgment entered in accordance with the notice by publication is void. Moreover, there never was a default entered in the record and certainly not a default judgment.

Because publication was improper, any alleged default judgment is void. Thus, laches and estoppel are not available defenses.

Petitioners' Motion for Summary Judgment was proper and should have been granted under the Montana Probate Code and Trust Code (with which the District Court agreed, other than its decision that Notice, judgment, laches and estoppel precluded such a finding and order).

Finally, regardless of any of the above arguments, if for no other reason, the money should have been redistributed and escheated to the State of Montana, not be kept by the Respondents, to the exclusion of the valid "then living heirs-at law" of Sue Bovey.

VI. ARGUMENT

A. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT TO THE COUCH AND FAEGRE RESPONDENTS BASED UPON FAULTY NOTICE BY PUBLICATION, THEREBY USURPING THE DISTRICT COURT'S JURISDICTION AND RENDERING ANY "PHANTOM" JUDGMENT VOID.

1. The Alleged Notice in the Trust Proceeding was Improper Under the Montana Trust Code, Because Christine, Melissa and Toni were "Indispensable Parties".

The District Court found that a minute entry in the Missoula District Court proceeding precluded Christine, Melissa and Toni from a return of the property improperly distributed. Missoula Docket No. 62 and App. Ex. 8. That theory, of course, is necessarily impacted by whether or not service by publication on Christine, Melissa and Toni was appropriate under the Montana Trust Code or the Montana Probate Code.

This Court should take note that this proceeding originally took two

courses. On February 10, 2000, the Couch Respondents filed a *Petition for Order Reopening Estate of Sue Ford Bovey*. Cascade County Doc. No. 19. Next, on March 6, 2000, the Trustee, Norwest, filed its *Verified Petition for Order Ascertaining Beneficiaries and Determining to Whom Trust Property Shall Pass or be Delivered Upon Final or Partial Termination of Trust.* Missoula Doc. No. 1. Norwest's *Petition* recited that Lisa Bovey and the Couch Respondents had all "asserted to the Trustee their claim to the residue of the Sue Ford Bovey Testamentary Trust." *Id.* at p. 3, l. 2-7. As a result, the Trustee further stated that it brought the "matter pursuant to MCA §72-35-301(1)(d)(1999) for the purpose of ascertaining beneficiaries and determining to whom properties shall pass or be delivered . . ." *Id.* at p. 3, l. 17-18.

It is also important to keep in mind the alleged "Notice" (that the Cascade County District Court probate proceeding found was proper), was published in the Missoula trust proceeding. However, notice by publication is not allowed in a trust proceeding. Proper notice is in accordance with Mont. Code Ann. §72-35-306 (emphasis added), which states:

> (1) At least 14 days before the time set for the hearing on the petition, the petitioner shall cause notice of the time and place of hearing to be **mailed** to any of the following persons who are not petitioners
>
> . . .
>
> (b) all beneficiaries who are entitled to notice; and
>
> . . .
>
> (2) The notice for a petition and hearing requesting the court to settle accounts or pass upon the acts of the trustee or that otherwise

> may affect substantive property rights of a beneficiary or other interested party must state that fact in the notice and must further state that failure to appear and object bars any further claims against the trustee relating to the subject matter of the petition.

Nowhere in the statutes pertaining to Mont. Code Ann. §72-35-301, as opposed to an Estate proceeding, does it state notice may be given by publication.

The failed notice is important because Christine, Melissa and Toni are indispensable parties. As stated in *In re Trust B*, 2008 MT 153, ¶30, 343 Mont. 240, 184 P.3d 296:

> However, we clearly held in *Holmes* that devisees, and now we now [sic] hold the same for trust beneficiaries, are indispensable parties to their respective formal statutory proceedings who must receive notice of the proceedings and notice of entry of the order.

The notice allegedly given was also deficient because the *Summons by Publication* (Missoula Doc. No. 15), did not contain the language required by Mont. Code Ann. §72-35-306(2). That deficiency is a fatal error as further discussed *In re Trust B*:

> In 1999, subsequent to the proceeding at issue here, the Legislature amended § 72-34-306, MCA [sic: 72-35-306], to require notices of hearing in trust proceedings to state that "failure to appear and object bars any further claims against the trustee[,]" thereby addressing a default mechanism within the trust statutes which did not exist at the time of the hearing herein. *See* 1999 Mont. Laws 911.
>
> Because no notice of entry of order was served upon Zona and Rose, the ten-day limit for filing their Rule 59 motion for a new trial had not expired when their motion was filed with the District Court, and was not untimely.
>
> . . .

> . . . an order becomes final only when the time to appeal has expired. *In re Marriage of Nordberg*, 265 Mont. 352, 356, 877 P.2d 987, 990 (1994).

In re Trust B, ¶¶30, 31 and 38.

As a result, the alleged "notice by publication" is not even allowed in a Trust proceeding, thus rendering any judgment (of which there was none) void. Notwithstanding, even if this Court considers this matter a probate proceeding, there are myriad problems with the notice by publication rendering the lower court's decision a nullity.

2. Strict Compliance with the Rules of Notice by Publication was not Complied with and Therefore Any Alleged Notice was Improper.

Once the matter was consolidated into an estate proceeding in Cascade County District Court, a subsequent publication in a Cascade County newspaper might have been sufficient, but that did not happen. Mont. Code Ann. §72-1-301 (Notice of hearing in probate proceedings), Mont. Code Ann. §72-1-207 (Rules of Civil Procedure Apply to Probate Proceedings), and Rule 4D, Mont.R.Civ.P. (Service by Publication) (It should be noted that Christine, Melissa and Toni do not concede their birthright as "then living heirs-at-law" and as trust beneficiaries, could be abrogated by any notice whatsoever. See Argument D, below).

a. Any summons in a probate proceeding must be published in the county in which the action is pending.

As noted above, the proceeding in Missoula County District Court was a proceeding under a petition regarding the trust filed by Norwest, Missoula County Cause No. DV-00-152. There was <u>never</u> a publication in the Estate of

Sue Bovey, Cascade County Cause No. CDP-88-215, which necessarily would have required a publication in a Cascade County newspaper. Mont.R.Civ.P., Rule 4D(5)(d)(emphasis added) requires that:

> Service of the summons by publication may be made by publishing the same three times, once each week for 3 successive weeks, **in a newspaper published in the county in which the action is pending . . .**

Regardless of the requirement that notice by publication was faulty for not being published in a Cascade County newspaper, numerous other Rule 4D requirements for proper notice by publication were violated.

b. **The *Missoulian* publication was required to set forth the legal description of the real property affected by distribution from the trust.**

Mont.R.Civ.P., Rule 4D(5)(h) required that the legal descriptions of the real property to be distributed needed to be set forth in the Notice:

> Additional information to be published. In addition to the form of summons prescribed above in "C. Process, (2) Summons - form," the published summons shall state in general terms the nature of the action, and in all cases where publication of summons is made in an action in which the title to, or any interest in or lien upon real property is involved, or affected, or brought into question, the publication shall also contain a description of the real property involved, affected or brought into question thereby, and a statement of the object of the action.

The summons published in the *Missoulian* did not contain any reference to real property. Missoula County Docket No. 31. App. Ex. 5. The trust estate did contain real estate, which was ultimately distributed. App. Ex. 9 (the entry for July 7, 2006, discloses real estate was distributed). See also, *Trustee's Motion for Leave of Court to Market Real Property, With Incorporated Brief*,

Missoula Docket No. 41.

c. **The caption of Norwest's *Petition* and the affidavit filed in support of publication of summons omitted the names of ascertained persons.**

Mont.R.Civ.P., Rule 4D(5)(c) required that Norwest specifically set forth in its affidavit in support of publication, the names of Christine, Melissa, Toni, and the three Faegre Respondents (because at the time of publication, they had not made an appearance either). Rule 4D(5)(c) states:

> . . . and that the affiant has specifically named as defendants in such action all such persons whose names can be ascertained;
> . . .

Norwest's counsel clearly ascertained the names of Melissa, Christine, Toni, Robert Faegre, Mary Putnam and Shirley Faegre, he just professed an inability to find them. The names of Christine, Melissa and Toni were on the family tree which Dirk Williams had in his possession. *Infra* at p. 7. During discussions regarding the *Summons* he published in the newspaper, Dirk Williams, Norwest's counsel, testified:

> Q. Who did you intend to serve?
>
> A. Wells Fargo, through counsel, intended to serve all persons who claim or might claim an interest in the Estate. And we did not know – I did not know who that might be or where we would find them.
>
> Q. Did you make any effort to find Robert Faegre, Shirley Faegre and Mary Putnam?
>
> A. I did.
>
> Q. What efforts did you make?
>
> A. I looked – I had a Great Falls phone book in our Missoula office

and I looked in that. I looked in the Missoula phone book. The phone book I looked in Great Falls was a – an area phone book and saw no entries for those people. I believe that I asked my paralegal to look in the records of Cascade County for addresses. I don't remember that for sure. And we came up with no entries for the Faegres. We were not able to locate any of the three Faegres.

Q. Did you ask anyone at the Gough, Shanahan firm?

A. I don't recall.

. . .

Q. Did you ask the Trust company?

A. Yes.

Q. And they told you they didn't know where the Faegres could be found?

A. I believe that was the answer, yes.

Q. What efforts did you make to find Christine Carrier Couch, Melissa Reavis Couch and Toni Couch?

A. Using the family tree I was given, I attempted to contact Terry Couch and Joyce Couch, and again using the same methods I used with respect to – the Faegres, the Great Falls area phone book, the Missoula phone book, and I believe requested that my paralegal who was in Great Falls, check with the Cascade County Clerk and Recorder for an address.

Q. Did you ask any of their aunts and uncles for one?

A. I'd had no contact with their aunts and uncles except through their counsel.

Q. Then did you ask John Paul?

A. No. Not that I recall. Can I add something?

Q. Sure.

A. I also searched for these people on Yahoo People Search, and I was not able to find any entries for any of them – any of those one, two, three, four, five people that I mentioned, Mary Faegre, Shirley Faegre – excuse me Mary Faegre Putnam, Shirley Faegre, Robert F. Faegre, Terry Couch or Joyce Couch.

Deposition of Dirk Williams, p. 56, l. 21-25; p. 57, l. 1-18; p. 58, l. 1-25; p. 59, l. 1- 7.

Obviously Dirk Williams knew Christine, Melissa and Toni were beneficiaries and "then living heirs-at-law" of Sue Bovey, because he looked for them. However, he never alerted the Court to their existence, nor the fact that he could not find them.

d. **Norwest did not conduct a diligent search for Christine, Melissa and Toni before filing its affidavit requesting service by publication.**

Service by publication is also only appropriate if a diligent search is first conducted:

> . . . **if the defendant is an unknown claimant, by showing that the affiant has made diligent search and inquiry** for all persons who claim, or might claim any right, title, estate, or interest in, or lien, or encumbrance upon, such property, or any thereof, adverse to plaintiff's ownership, or any cloud upon plaintiff's title thereto, whether such claim or possible claim be present or contingent, including any right of dower, inchoate or accrued, and that the affiant has specifically named as defendants in such action all such persons whose names can be ascertained . . ..

Mont.R.Civ.P., Rule 4D(5)(c) (Emphasis added).

Likewise, Mont. Code Ann. §72-1-301(c) provides that publication is only allowed "if the **address** or identity **of any person is not known** and cannot be ascertained with reasonable diligence, by publishing in a weekly paper . . .." (Emphasis added). In this case, Christine, Melissa and Toni were all **known** persons, so publication is not allowed under the rules unless their addresses could not be found with "reasonable diligence". The "reasonable diligence" applied by Norwest was simply looking in a telephone book and looking on Yahoo People Search. A review of the *Certificate of Attempted Service* by Montana Process/Pro Serv, Inc. (Missoula Docket No. 13), indicates on its face that the fees charged to attempt service were $10.00 plus $1.50 mileage. This indicates that very minimal (not diligent) efforts were made to locate Christine, Melissa and Toni, much less addresses. Christine, Melissa and Toni should have been named and served personally with the *Summons* that was issued.

Further, Dirk Williams could have found Christine, Melissa and Toni by simply asking a few questions. He did not ask the other parties. Depo. of Dirk Williams, p. 61, l. 11-22. He did not ask the other attorneys. *Id.* He did not use an heir search firm. *Id.* He did not ask the attorneys for Sue Ford Bovey (Gough, Shanahan, Johnson & Waterman) who had the address for Joyce Couch and the names of Christine, Melissa and Toni in 1989. *Id.* In whole, Norwest totally failed to even attempt to find Christine, Melissa and Toni, which was its fiduciary obligation.

e. Norwest did not strictly comply with the Rule 4D requirements and did not obtain an order for publication.

Rule 4D(5)(c) also provides, that, only after strict compliance with the

affidavit requirements for service by publication, an order may be obtained to allow publication:

> . . . Upon complying herewith, the plaintiff may obtain an order for the service of summons to be made upon the defendants by publication, which order may be issued by either the judge or the clerk of the court.

There is no "order for the service of summons" in the District Court record. While it is acknowledged that a Summons was issued by the Missoula County Clerk of Court, the point of the significant failures under Rule 4D(5), is that strict compliance with the rules for publication of service must be observed. *Nikolaisen v. Advance Transformer Co.*, 2007 MT 352, ¶16, 340 Mont. 332, 174 P.3d 940.

3. Because Strict Compliance with the Rules for Publication were not Observed, the Notice by Publication was Improper, the District Court's Jurisdiction was Undermined and Any Resulting Judgment (of Which There is None) is Void as Well.

First, where strict and literal compliance with the mandates of M.R.Civ.P. 4D are not followed, the Notice by Publication is faulty and the Court lacks any jurisdiction to make a decision. Because it lacks jurisdiction, any judgment is void as well:

> If the plaintiff does not properly serve the defendant pursuant to M.R.Civ.P. 4(D), the judgment is void because without proper service the district court does not obtain personal jurisdiction over a party. *See Ihnot v. Ihnot*, 2000 MT 77, ¶8, 299 Mont. 137, ¶8, 999 P.2d 303, ¶8. **Each step of the procedure prescribed by Rule 4(D) requires strict and literal compliance to support a judgment based on substituted or constructive service**. *Shields v. Pirkle Refrigerated Freightlines, Inc,*, 181 Mont. 37, 43-44, 591 P.2d 1120, 1124 (1979), *overruled on other grounds*, *Roberts v.*

> *Empire Fire & Marine Ins. Co.,* 276 Mont. 225, 228, 915 P.2d 872, 873 (1996); *Ihnot*, ¶13. *See also Joseph Russell Realty Co. v. Kenneally*, 185 Mont. 496, 502, 605 P.2d 1107, 1110 (1980).

Nikolaisen v. Advance Transformer Co., 2007 MT 352, ¶16, 340 Mont. 332, 174 P.3d 940 (emphasis added).

Here, nothing remotely close to strict and literal compliance with Rule 4D was followed to support a judgment against Melissa, Christine and Toni. Since the failure of the publication of notice was flawed, so too is the District Court's decision based upon the judgment that does not exist (remember it is only mentioned in passing in a minute entry from the Missoula District Court and there is no formal, signed judgment). See, Missoula Docket No. 62; App. Ex. 8.

Because notice was defective, the District Court never had jurisdiction over Melissa, Christine and Toni and any judgment relied upon by the District Court, particularly a default judgment that was never entered, is void:

> The nature of service is two fold: it serves notice to a party that litigation is pending, and it vests a court with jurisdiction. **Improper service undermines a court's jurisdiction, and a default judgment subsequently entered is thereby void.** *See Sink v. Squire* (1989), 236 Mont. 269, 273, 769 P.2d 706, 708; *Shields v. Pirkle Refrigerated Freight Lines, Inc., et al.* (1979), 181 Mont. 37, 45, 591 P.2d 1120, 1125.
>
> . . .
>
> The directions of the service of process rule are mandatory and must be strictly followed even where a defendant has actual notice of the summons and complaint; knowledge of the action is not a substitute for valid service. *See In re Marriage of Blaskovich* (1991), 249 Mont. 248, 815 P.2d 581; *Holt v. Sather* (1928), 81 Mont. 442, 264 P. 108.

Fonk v. Ulsher, 260 Mont. 379, 383-84, 860 P.2d 145, 147 (1993)(emphasis added).

Second, the Minute Entry was never a signed order of Judge Henson. It merely states: "Said procedure was not opposed, and allowed by the Court." Missoula Docket No. 62; App. Ex. 8. Nowhere in the court record is there a Default, there is merely the *Praecipe* requesting a default be taken (based on erroneous information). Missoula Docket No. 63. App. Ex. 6.

Third, **nowhere** in the court records is there an entry of default and certainly no judgment was filed. Say what the Couch and Faegre Respondents might, until there is a default judgment, Christine, Melissa and Toni are not precluded from entering the action (of course, it is Christine's, Melissa's and Toni's position that they are heirs and their rights can not be abrogated by a default or default judgment, and, in the worst case, their share escheats to the State of Montana. See, Argument D, below).

A default judgment could only be entered by a court. Mont.R.Civ.P. 55(b)(2). **There was no default judgment entered**. Even if the court finds an entry of default was made (which it was not), "the default entry is simply an interlocutory order that **in and of itself determines no rights or remedies,** whereas the default judgment is a final judgment that terminates the litigation and decides the dispute." *Cribb v. Matlock Communications, Inc.*, 236 Mont. 27, 30, 768 P.2d 337, 339 (1989)(citing *Hertz v. Berzanske,* (Alaska 1985) 704 P.2d 767, 770)(emphasis added). Thus, no rights of Christine, Melissa and Toni were determined by any default proceeding.

Fourth, and even more compelling, is that any "phantom" default was not taken in conformance with the Rules of Civil Procedure (both proper service

under Rule 4D and Rule 19, Joinder). No one told Judge Henson about Christine, Melissa and Toni, as they most certainly were required to do under Mont.R.Civ.P. 19(c):

> A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as describe in subdivision (a)(1)-(2) hereof who are not joined, and the reasons why they are not joined.

Subpart (a) of Rule 19 provides that parties shall be joined if in their absence, "complete relief cannot be accorded among those already parties." Moreover, Judge Henson was required to:

> . . . determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgement, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for non joinder.

Mont.R.Civ.P. 19(b).

Obviously, Judge Henson did not follow Rule 19(b). None of those factors were considered by him. But it was not his fault. **No one told Judge Henson about the other potential heirs**.

Fifth, it has been the law of Montana for nearly a century that in order for a judgment to be effective, it must be a signed written pleading and entered in the District Court. A Minute entry is not a judgment:

> There was not any judgment entered, but only a minute entry of the

order. The order is not a judgment.

Pentz v. Corscadden, 49 Mont. 581, 581, 144 P. 157, 158 (1914).

The same is true under the Montana Rules of Civil Procedure. Mont. R.Civ.P., Rule 58 provides:

> . . .; but when the court directs entry of judgment for other relief, the judge shall promptly settle or approve the form of the judgment and direct that it be entered by the clerk. . . .

That never happened. Of course, that is also a fatal flaw:

> Finally, the District Court did not enter a final judgment. "A judgment is not final until it is set out separately and entered as required by Rule 58." 10 Wright and Miller, at §2656. Although the District Court did order the clerk of court to enter final judgment in this case, final judgment was never docketed in the record. Therefore, this Court is without jurisdiction to hear or decide the merits of this appeal.

Jackson v. Burlington Northern, Inc., 201 Mont. 123, 126, 652 P.2d 225 (1982).

In other words, even if publication had provided proper service, there never was a judgment docketed against Christine, Melissa and Toni, and therefore, the District Court's summary judgment order is improper as it relates to the alleged notice by publication and a "phantom" judgment, that never actually took place. For these reasons alone, the District Court's Order granting summary judgment based on notice should be reversed and Chris, Melissa and Toni's Motion for Summary Judgment should be granted and judgment accordingly entered.

B. LACHES AND ESTOPPEL ARE NOT AVAILABLE DEFENSES WHERE A JUDGMENT IS VOID, OR, AS

HERE, WAS NEVER ENTERED IN THE FIRST PLACE.

1. The Improper Service of Summons by Publication Eliminated the Defenses of Laches and Estoppel.

The District Court also based its decision on laches and estoppel. However, laches and estoppel are not available defenses where service was improper and the judgment (if entered) is void. In *Shields v. Pirkle Refrigerated Freight Lines, Inc., et al.*, 181 Mont. 37, 591 P.2d 1120 (1979), a defendant, Western Supply, Inc., was allegedly served with process by publication. Western Supply never made an appearance in the litigation (even though it actually received a copy of the summons and complaint), and judgment was entered against it. **Three years later**, Western Supply entered the action. "There is no explanation anywhere in the record why Western Supply, Inc., waited three years before taking steps to invalidate the default judgment." *Id*. at 39-40, 591 P.2d at 1122. Even with an unexplained three year delay, this Court found that laches and estoppel were not valid defenses where service of process by publication was improper for failure to strictly comply with the requirements of Rule 4D:

> Plaintiff argues that even if service was so improper as to render the judgment void for lack of jurisdiction, nonetheless defendant is estopped or barred by laches from having the default set aside now. As previously noted, defendants' motion for relief here was made under Rule 60(b)(4), M.R. Civ. P., authorizing relief from void judgments. There is no time limit on an attack on a judgment as void under Rule 60(b)(4). "A void judgment cannot acquire validity because of laches on the part of the judgment debtor." 11 Wright & Miller, Federal Practice and Procedure: Civil s 2862 (construing Rule 60(b)(4), F.R.Civ.P., which is identical to the similarly numbered Montana Rule).

Id. at 45, 591 P.2d at 1125.

The same is true here. Even with actual notice, Christine, Melissa and Toni are not barred from bringing their claim. The District Court however based its decision in part on the fact that "Petitioners Reavis and Carrier obtained actual knowledge of the litigation involving Respondents' claims to the Sue Ford Bovey Estate in 2003 and 2004 based upon articles published in the *Great Falls Tribune*." *Order Re Motions for Summary Judgment*, p. 9, l. 20-23. App. Ex. 1. While it is not conceded that seeing an article in a newspaper is substituted or constructive service, even if Christine, Melissa and Toni had seen the article, the same as Western Supply, it did not prevent their cause of action from being timely.

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2. As Heirs of Sue Bovey, Christine, Melissa and Toni had No Obligation to Enter the Litigation to Establish Their Birthright, the Same as Their Experiences with Their Grandmother, Beverly Couch's Estate.

Christine, Melissa and Toni did have a reason for not entering the litigation. They were "then living heirs-at-law" of Sue Bovey and were not required to litigate their birthright. Christine, Melissa and Toni also had a previous experience with probate and inheriting from a decedent as heirs. When their grandmother, Beverly Couch, died in June 1993, the probate was filed as Cascade County Cause No. CDP-93-199. See, *Application for Informal Probate of Will and Appointment of Personal Representative*, Depo. Ex. 28. App. Ex. 10. Beverly Couch's *Last Will and Testament* was signed February 23, 1977. Depo. Ex. 28. App. Ex. 11. Her *Will* provided for equal distribution to

her then living five children to be "divided equally among them." *Id*. However, by the time of Beverly's death in 1993, Terry Couch, the father of Christine, Melissa and Toni, had already died. Thus, Christine, Melissa and Toni inherited their father's share by representation. They did not have to do anything to inherit the money.

More compelling however, is on October 4, 2006, Greg Hatley, counsel for Respondents herein, filed a *Petition to Reopen Informal Probate of Will and Re-Appointment of Personal Representative* in Beverly Couch's probate on behalf of Respondent Connie Sisko as the personal representative, because additional assets (real estate) of Beverly Couch had been discovered. Depo. Ex. 28. App. Ex. 12. The Court should note the application date was well before the *Amended Petition for Order for Redistribution of Property Improperly Distributed* filed herein (April 16, 2007).

Christine, Melissa and Toni were named as heirs and devisees in the *Petition*. Their addresses, at least Christine's and Melissa's which were accurate, were obviously determinable by Greg Hatley, although he does not remember where he got the addresses. Depo. of Greg Hatley, p. 10, l. 10-25.

The above facts obviously lend credibility to the lack of diligence argument related to Dirk Williams' efforts regarding publication of notice. More importantly, Christine, Melissa and Toni obviously did not have to do anything to inherit the assets. See, Depo. Ex. 28, *Acknowledgment of Receipt of Final Distribution* for Christine, Melissa and Toni. App. Ex. 13. "When a person dies intestate his property vests immediately at death in his heirs. More importantly, there is no requirement that a suit to establish heirship be brought." *Kennedy v. Anderson*, 881 So.2d 340 (Miss.Ct.App. 2004) (¶19)(citing *In Re McRight*, 766 So.2d 48, 49 (¶10) (Miss.Ct.App. 2000) and *Matter of Heirship of McLeod*, 506

So.2d 289, 291 (Miss. 1987)).

As clearly demonstrated by their past experiences and the above-cited cases, any attempt to extinguish Christine's, Melissa's and Toni's birthright as "then living heirs-at-law" of Sue Bovey is invalid.

C. CHRISTINE, MELISSA AND TONI HAVE TIMELY FILED A PETITION TO RETURN THE IMPROPERLY DISTRIBUTED PROPERTY AND ARE ENTITLED TO INCOME OR INTEREST ON THE AMOUNTS OWED.

The *Petition* in the instant case is a proceeding to recover property improperly distributed under the terms of the Last Will and Testament of Sue Ford Bovey. Instructive in that regard, Mont. Code Ann. §72-3-1013(1) (emphasis added) states:

> Unless previously adjudicated in a formal testacy proceeding or in a proceeding settling the accounts of a personal representative or otherwise barred, the claim of any claimant to recover from a distributee who is liable to pay the claim and **the right of any heir** or devisee or of a successor personal representative acting in their behalf **to recover property improperly distributed or the value thereof from any distributee** is forever barred at the later of 3 years after the decedent's death **or 1 year after the time of distribution thereof**.

The official comment to the above section states: "[t]his section describes an ultimate time limit for recovery by . . ., **heirs and devisees** of a decedent from distributees. . . ." Mont. Code Ann. §72-3-1013, *Official Comments* (emphasis added). That is the point of this case, i.e. for Christine, Melissa and Toni to recover from the Respondents, the property that was improperly distributed. The first distribution of assets occurred on July 7, 2006. App. Ex. 9. Ironically, even after the *Amended Petition* filed herein (April 16, 2007), there were two

more distributions made in May 10, 2007 and July 7, 2007. *Id*.

> Mont. Code Ann. §72-3-317(4), is also applicable, which states:
> The order originally rendered in the testacy proceeding may be modified or vacated, if appropriate under the circumstances, by the . . . order redetermining heirs.

In order for a redistribution of the property improperly distributed to take place, Mont. Code Ann. §72-3-906 is further helpful. It states:

> . . . , a distributee of property improperly distributed . . . is liable to return the property improperly received and its income since distribution if he has the property. If he does not have the property, then he is liable to return the value as of the date of disposition of the property improperly received and its income and gain received by him.

As a result, Christine, Melissa and Toni are entitled to income and gain on the redistribution amount in accordance with Mont. Code Ann. §72-3-906. Alternatively, they are entitled to interest for the reason it is a sum certain, in accordance with Mont. Code Ann. §27-1-211.

D. THE DISTRICT COURT'S DECISION THAT CHRISTINE, MELISSA AND TONI ARE PRECLUDED FROM RETURN OF THEIR INHERITANCE FOR ANY REASON IS A RED HERRING BECAUSE, IF NOTHING ELSE, THEIR SHARE SHOULD HAVE ESCHEATED TO THE STATE OF MONTANA, RATHER THAN BEING DISTRIBUTED TO THE OTHER HEIRS.

Redistribution is required in this case for another reason. As has been discussed earlier, Christine, Melissa and Toni were known heirs of Sue Ford Bovey. As such, even if they could not be located after due diligence, their share of the trust estate should not have been distributed to the Respondents, but

rather, their share should have escheated to the state of Montana. Mont. Code Ann. §72-3-918 provides:

> (1) If an heir, devisee, or claimant cannot be found, the personal representative shall distribute the share of the missing person to his conservator, if any, otherwise to the department of revenue to be deposited in the state escheat fund as provided in chapter 14, as amended.
>
> (2) Any person having any claim to a share deposited in the state escheat fund under the provisions of this code shall follow the procedures set out in chapter 14, concerning escheated estates, to claim such share.

A similar statute is applicable with trust assets. Mont. Code Ann. §72-14-401 (emphasis added) states:

> **When property in the hands of a** . . ., **trustee**, . . . **is assigned or distributed to any heir, legatee, devisee**, . . .**who cannot be found** . . ., **the** . . ., **trustee**, . . . **may deposit the money in a special fund in the name of the heir, legatee, devisee**,. . .**with the county treasurer of the county in which the proceedings are pending** . . ., who shall give a receipt for the same and be liable upon his official bond therefor; and said receipt shall be deemed and received by the court or judge thereof as a voucher in favor of the . . ., trustee, or other fiduciary with the same force and effect as if executed by such heir, legatee, devisee, creditor, beneficiary, or person interested.

Money escheated to the State of Montana is held in trust for 5 years. Mont. Code Ann. §72-14-210. The statute of limitations for Christine, Melissa and Toni to then apply to the state of Montana for their inheritance is 5 years after the State receives it. Mont. Code Ann. §72-14-302 states:

> Such action must be brought within 5 years from the date on which the money or property is received by the state treasurer, saving, however, to minors and persons of unsound mind or citizens of the United States beyond the limits of the United States, the right to

> commence their action at any time within the time limited or 5 years after their respective disabilities cease.

As the monies in this case were distributed to the Respondents in 2006 and 2007, if Christine's, Melissa's and Toni's shares had been placed in the state escheat fund, they would be well within the five year time frame to recover those funds. However, since they have filed a *Petition* to redistribute funds, it is not necessary to place the funds with the state, but to simply redistribute them to the proper heirs.

Nowhere in the above statutes is there a suggestion that the other co-devisees may keep the money. The instant case is the same as *Estate of Russell*, 387 So.2d 487 (Fla. 2d DCA 1980). In that case, the decedent's will provided for one-half of her estate to be distributed to her son and one-half to her three step-children. *Id.* at 488. The son was appointed personal representative. *Id.* The personal representative could not find the step-children and so, a guardian ad litem was appointed for them. *Id.* The guardian ad litem could not find the three step-children either. *Id.* The son contended that the entire estate should therefore lapse and belong to him. *Id.* at 489.

The court disagreed and, in accordance with the decedent's will, distributed the money one-half to the son and the other one-half to the State of Florida, in accordance with Florida's version of Mont. Code Ann. §72-3-918 (1) (Uniform Probate Code §3-914; Section 733.816, Florida Statutes (1977)). Under Florida's statutes, the three step-children then had 10 years to retrieve the funds from the State of Florida. *Id.* at 489. That is the same procedure that should have been followed here.

The instant case is strikingly similar in many aspects to *State of*

California v. Broderson, 247 Cal.App.2d 797, 56 Cal.Rptr. 58 (1967). In *Broderson*, the collateral heirs of the predeceased spouse (the husband) filed a Petition claiming the whole of the decedent's Estate, knowing that one-half of the decedent's Estate was subject to the claims of others, in particular the State of California, by virtue of escheating. Instead of only taking one-half of the estate, the four heirs claimed the entire estate. The heirs then contended that even though the intestate succession law was not properly followed, they were "nevertheless entitled to the entire estate of Vivian because the decree determining the heirship found they were entitled to the whole estate; the decree has become final; it is not subject to attack in the absence in extrinsic fraud, and extrinsic fraud is not shown here." *Id.* at 804, 56 Cal.Rptr. at 62.

> The heirs argued further, that the:
> Petition to determine heirship correctly stated all of the material facts, namely that Vivian died intestate; that petitioners are relatives of George, her predeceased husband; that Vivian left no heirs, and that her estate consists of former community property. They assert that the only possible heir in the petition is the final allegation of a conclusion of law, namely that ". . . said aforesaid heirs are entitled to all of said estate in equal proportions . . .." Thus, they say that since there has been no representation of concealment of any fact, extrinsic fraud is not present, and the decree is conclusive.
>
> . . .
>
> her half would in the absence of heirs entitled take, escheat to the State.

Id. at 804-05, 56 Cal.Rptr. 63.

"Appellants were under a duty to reveal to the probate court the extent of their knowledge, so that it might enter a proper decree. Failure to reveal that knowledge has prevented the State of asserting its claim, and precluded

appellants' reliance upon the finality of the decree." *Id.* at 804-05, 56 Cal.Rptr. 63.

Much the same could be said in the instant case. While the Couch/Faegre Respondents acknowledge that Christine, Melissa and Toni were proper heirs and were left out of the litigation, the Couch/Faegre Respondents insist they are entitled to the whole estate, while in fact the law provides that, even if Christine, Melissa and Toni could not be found, three-tenths of the Estate would simply escheat to the State of Montana, the same as it should have escheated to the State of California in the *Broderson* case.

If for no other reason, the money belonging to Chris, Melissa and Toni should have been delivered to the State of Montana. Thereafter, they could make application to the State for the money held on their behalf for 5 years from the distribution.

VII. CONCLUSION

If the improper distribution is not corrected, it will turn Montana probate, trust and escheated property law on its head. Simply put, if it is a requirement that heirs must make a timely claim to inheritance or trust proceeds, rather than fiduciaries making proper distributions of birthrights, rightful heirs and the State of Montana will lose out on significant property entitlements. In the end, Christine, Melissa and Toni are "then living heirs-at-law" of Sue Ford Bovey, and thus entitled to 3/10 of the real and personal property distributed. If nothing else, their share of the money should escheat to the State of Montana. The significant impact of this case on Montana law suggests oral argument is appropriate.

DATED this 19th day of May, 2010.

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CERTIFICATE OF MAILING

I, the undersigned, do hereby certify that a copy of the within and foregoing BRIEF OF APPELLANTS was mailed on the 19th day of May, 2010, at Great Falls, Montana, and directed to the following:

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_____
Donna M. Osterman

CERTIFICATE OF COMPLIANCE

I, Kirk D. Evenson, one of the attorneys for Appellants, hereby certify that:

(1) Said BRIEF OF APPELLANT, filed herewith has a line spacing of 2.0, except for footnotes and quoted, indented material, which have a line spacing of 1.0;

(2) Said BRIEF OF APPELLANT, is proportionately spaced and uses a 14 point Times New Roman typeface; and

(3) Said BRIEF OF APPELLANT, has a word count of 9,342 as counted by WordPerfect X4 for Windows, not averaging more than 280 words per page, not including the Table of Contents, Table of Authorities and Certificate of Mailing.

DATED this 19th day of May, 2010.

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